BADRUL ZAMAN PS MD ZAKARIAH

v.

JABATAN PENYIARAN RADIO DAN TELEVISYEN MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2-21-01-2001]
9 APRIL 2001

CIVIL PROCEDURE: *Judgment - Default of defence - Claim for unliquidated damages - Plaintiff entered final judgment against defendant - Whether judgment entered should be interlocutory - Rules of the High Court 1980, O. 19 rr. 2, 3*

CIVIL PROCEDURE: *Judgment - Default of defence - Claim for unliquidated damages and injunction - Claim for injunction subsequently withdrawn - Whether plaintiff to proceed with O. 19 r. 3 Rules of the High Court 1980 for interlocutory judgment - Whether plaintiff to resort to O. 21 r. 2(1) before recourse to O. 19 r. 3*

The plaintiff brought an action in defamation for damages and injunction against the four defendants. Upon service effected against the defendants, the first three defendants requested for an extension of time to file their defences whilst the fourth defendant did not do so. The plaintiff then entered final judgment against the fourth defendant for RM100,000,000. The fourth defendant now applied to set aside the said judgment, claiming that the plaintiff ought to have obtained an interlocutory judgment as the plaintiff's claim was for unliquidated damages pursuant to O. 19 r. 3 Rules of the High Court 1980 ('RHC'). The plaintiff claimed that O. 19 r. 3 was inapplicable as the plaintiff had also sought for an injunction.

Held:

[1] When a defendant fails to file a defence against a claim for liquidated damages, the plaintiff's recourse is pursuant to O. 19 r. 2 RHC 1980, *ie*, to enter final judgment against the defendant. In a claim for unliquidated damages, the plaintiff's recourse is pursuant to O. 19 r. 3 RHC, *ie*, to enter an interlocutory judgment against the defendant.

[2] The plaintiff had also sought a prayer for an injunction. Appropriately O. 19 r. 7(1) RHC applied since a claim for an injunction did not fall anywhere between r. 2 to r. 5 of O. 19 RHC. The plaintiff could have

bypassed O. 19 r. 7(1) pursuant to O. 21 r. 2(1) RHC if he had shown to the satisfaction of the court that he had withdrawn his claim for an injunction and then proceeded with O. 19 r. 3 RHC.

[Judgment set aside; costs to plaintiff.]

Case(s) referred to:

Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 ***(foll)***

Seok Mee Seong v. Abdul Wahab Abdul Rahman [1988] 1 CLJ 694 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 19 rr. 2, 3, 4, 5, 7(1), (3), O. 21 r. 2(1)

For the 4th defendant - Paul Subramaniam (T Thavarajah with him); M/s Zaid Ibrahim & Co

Badrul Zaman PS Md Zakariah in person

Reported by John Henry Louis

JUDGMENT

RK Nathan J:

Facts

The plaintiff sued the defendants in defamation. For the purpose of the present proceedings there is no need for me to go into details of the plaintiff's claim except to state that the plaintiff prayed for:

(1) General damages which he quantified at RM100,000,000 as against each of the defendants.

(2) Exemplary damages.

(3) Special damages.

(4) An injunction restraining the defendants or their agents from repeating the libel against the plaintiff.

(5) Costs.

(6) Interests.

The plaintiff then effected service as against each of the defendants who entered appearance. Whilst the first three defendants represented by the Attorney General's Chambers wrote to the plaintiff and obtained an extension of time to file the defence, the 4th defendant (the defendant) did not do so. On 23 February 2001 the plaintiff entered judgment against the defendant for RM100,000,000 with interest at 8% and costs.

On 26 February 2001 the defendant applied by way of an *ex parte* application to stay execution on the judgment dated 23 February 2001 until the defendant's application to set aside the said in default judgment was heard, and also prayed that costs be in the cause. I granted an order in terms of the *ex parte* application and fixed the hearing of the *inter partes* application to 7 March 2001.

In the meantime by way of encl. 10 the defendant applied to set aside the in default judgment dated 23 February 2001. Enclosure 10 was fixed for hearing *inter partes* on 8 March 2001. As the plaintiff was unrepresented I enquired if he wished to file any affidavit in reply and if not, whether he was prepared to respond. He indicated that he was ready to respond. I then informed the plaintiff that since he did not have the benefit of counsel I would explain to him in simple language any argument of the defendants that he did not understand. After each argument I asked the plaintiff if he understood and he indicated that he did. Indeed the plaintiff came prepared with a written submission to which he frequently referred to, but which he did not tender to court. The defendant tendered a skeletal submission.

Findings Of The Court

It was the defendant's contention that the judgment entered by the learned senior assistant registrar (SAR) was irregular. Referring to the judgment itself the defendant argued that it was in fact in the form of a final judgment for RM100 million with interests at 8% from the date of the said judgment and costs. Again referring to the reliefs prayed for, which I had enumerated earlier in my judgment, the defendant pointed out that the prayers for damages were for general damages. In fact I note that whilst there was a prayer for special damages, the same was not quantified. Referring to *Seok Mee Seong v Abdul Wahab bin Abdul Rahman* [1988] 1 CLJ 694 the defendant argued that the words "debt or liquidated demand" do not extend to unliquidated damages even if that amount of damages is pleaded as a definite figure. I agree. To my mind the judgment in default of defence as entered is clearly irregular and ought to be set aside *ex debito justitiae.*

The recourse of the plaintiff when a defendant fails to file his defence against a claim for liquidated damages is to act pursuant to O. 19 r. 2 of the Rules of the High Court 1980 (the RHC). The said rule reads as follows:

> 2 (1) Where the plaintiff's claim against a defendant is for a liquidated demand only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.
>
> (2) Order 13, rule 1(2) shall apply for the purposes of this rule as it applies for the purposes of that rule.

In respect of a claim for unliquidated damages the plaintiff must act pursuant to O. 19 r. 3 of the RHC which reads as follows:

> 3. Where the plaintiff's claim against a defendant is for unliquidated damages only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any.

The judgment obtained on 23 February 2001 is clearly in the form of a final judgment as it has abandoned all other prayers and has brought finality to the proceedings between the plaintiff and the defendant. The plaintiff could not have obtained a final judgment on a prayer for unliquidated damages. In fact even the prayer for special or liquidated or ascertained damages as they are interchangeably called, has been abandoned in this final judgment. The plaintiff's remedy was pursuant to O. 19 r. 3 whereby he ought to have only obtained interlocutory judgment against the defendant with damages to be assessed and for costs.

But Mr. Paul Subramaniam argued that even O. 19 r. 3 is not available to the plaintiff because of the prayer for an injunction claimed by the plaintiff as against all the defendants. Counsel referred me to O. 19 r. 7(1) of the RHC which reads as follows:

> 7(1) Where the plaintiff makes against a defendant or defendants a claim of a description not mentioned in rules 2 to 5, then, if the defendant or all the defendants (where there is more than one) fails or fail to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under the rules for service of the defence, apply to the court for judgment, and on the hearing of the application the court shall give such judgment as the plaintiff appears entitled to on his statement of claim.

Whilst O. 19 r. 2 deals with liquidated claims and r. 3 deals with unliquidated claims, r. 4 deals with a claim in detinue and r. 5 deals with a claim for possession of immovable property. Since a claim for an

injunction does not fall within any of these rules clearly r. 7(1) must apply. In such a case the plaintiff ought to have, after the expiration of the period fixed for filing the defence, applied to the court by summons or motion pursuant to O. 19 r. 7(3) for judgment. On the date fixed for the hearing of that application the court, after hearing the plaintiff and possibly the defendant, would then give such judgment that the court deems that the plaintiff is actually entitled to. The plaintiff could have bypassed O. 19 r. 7(1) if he had shown to the satisfaction of the court that he had withdrawn the claim for an injunction. This he can do pursuant to O. 21 r. 2(1) of the RHC which reads as follows:

> 2(1) The plaintiff in an action begun by writ may, without the leave of the court, discontinue the action, or withdraw any particular claim made by him therein, as against any or all of the defendants at any time not later than 14 days after service of the defence on him or, if there are two or more defendants, of the defence last served, by serving a notice in Form 36 to that effect on the defendant concerned.

Since no defence was filed the plaintiff ought to have filed Form 36, thus indicating his intention to abandon the claim for an injunction and in which case he could have proceeded pursuant to O. 19 r. 3 of the RHC.

I am satisfied that the final judgment obtained by the plaintiff as against the 4th defendant on 23 February 2001 was indeed an irregular judgment. In *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 4 CLJ 127 the Court of Appeal expressed its views in no uncertain terms as to what ought to be done to a judgment obtained irregularly. This is what the court said at p. 135:

> … the default judgment taken by the respondent is an irregular judgment and ought not to be allowed to subsist. That being the case, the appellant is entitled to have it set aside *ex debito justitiae.*

I therefore set aside the judgment. With regard to costs, the plaintiff submitted that had the defendant applied to him he would have granted an extension of time to file the defence. In fact the Attorney General on behalf of the other defendants did write to him for an extension of time, and he granted the extension. I therefore was of the view that since it was the defendant who had by default of filing the defence on time, precipitated the subsequent flow of events, the said defendant ought to pay the plaintiff the costs of this application. I then directed the defendant to file its defence within ten days from the date of my order.